

³ The Board notes that, following the June 10, 2020 decision, OWCP received additional evidence. However, the Board's *Rules of Procedures* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether OWCP properly determined that appellant forfeited her right to compensation for the period November 26, 2016 to February 26, 2018, pursuant 5 U.S.C. § 8106(b)(2) of FECA, because she knowingly failed to report her employment activities and earnings.

FACTUAL HISTORY

On August 26, 2016 appellant, then a 64-year-old rural carrier associate, filed a traumatic injury claim (Form CA-1) alleging that on August 25, 2016 she injured her left knee when she slipped and fell on “some rocks” while in the performance of duty. She stopped work on August 25, 2016. OWCP accepted the claim for a closed nondisplaced fracture of the right tibia, a tear of the medial meniscus of the right knee, and a left knee contusion. It paid appellant wage-loss compensation on the supplemental rolls beginning October 10, 2016 and on the periodic rolls beginning November 8, 2016.

On February 10, 2017, February 26 and April 5, 2018 appellant signed EN1032 forms, which contained language advising her of what type of employment activities, earnings, and volunteer activities she was required to report for each 15-month period prior to the time she signed each form. The EN1032 forms instructed her to report all employment for which she received a salary, wages, income, sales commissions, piecework, or payment of any kind. Appellant was directed to report all self-employment or involvement in business enterprises, including (but not limited to) farming, sales work, operating a business, and providing services in exchange for money, goods, or other services. The forms contained certification clauses informing her of the consequences of not accurately reporting her employment activities, such as being subjected to criminal penalties and losing the right to receive workers’ compensation.

On a Form EN1032, signed February 10, 2017, appellant indicated that, during the past 15 months, she had worked for the employing establishment from November 25, 2015 to August 25, 2016. She also advised that she was self-employed working for PNJ Formals hemming dresses. Appellant specified that she earned \$8.00 per hour and had earned \$2,126.00 in 2016.

In a Form EN1032 signed February 26, 2018, appellant responded with an “X” to the questions of whether she had worked for an employer or had been self-employed during the past 15 months. She answered “Yes” that she had been unemployed for all periods during the past 15 months.

On March 6, 2018 counsel asked OWCP why the Office of the Inspector General (OIG) had contacted appellant and why OWCP had sent the OIG a copy of her Form EN1032.

OWCP, on March 22, 2018, advised appellant that she had not adequately responded to the questions posed about her employment or self-employment on her February 2018 Form EN1032. It reminded her of the penalties for providing false or fraudulent statements.

In a Form EN1032 signed April 5, 2018, appellant indicated that she had been self-employed from “February through April” at Joy2Sew. She advised that it was contract work

performed for her by her children, that the pay depended on the job, and that the work involved alterations and sewing.

In a February 28, 2019 Form EN1032, appellant indicated that she had worked for PNJ Formals from January 2018 to May 2019 and had earned \$3,610.00. She also was self-employed with Joy2Sew performing alterations from January to May 2018. Appellant indicated that she had earned \$1,200.00.

The employing establishment's OIG's office provided OWCP with an April 29, 2020 report of investigation covering the period April 13, 2018 to April 29, 2020. It advised that an OIG investigation confirmed that she had performed sewing and alteration services. The OIG related that, after stopping work due to her employment injury, appellant had opened Joy2Sew performing alterations for two clothing businesses. It began investigating her in March 2018, noting that Facebook posts dated March 2, 2017 to January 24, 2018 verified her affiliation with Joy2Sew. On July 12, 2018 two agents with the OIG posed as customers. Appellant told them that she was trying to buy the building she currently rented and had painted the entire inside of the building without help in 24 hours. She advised that she could sit and stand as needed working as a seamstress, and noted that she could not lift 100 pounds or sit continuously since her injury as required in her work for the employing establishment. Appellant related that she rented and sold dresses for \$75.00 to \$100.00. On September 12, 2018 the OIG agents picked up the altered dress and paid her \$60.00 in cash for the alterations. Appellant told the agents that, during prom season the previous year, she had "altered 52 dresses in one week and altered 35 dresses the week prior, which contradicts her 2018 Form EN1032."

The OIG noted that on March 25, 2019 it had issued subpoenas for the earnings records from P&J Formal Country, Elan Formalwear, and Joy2Sew. Elan Formalwear indicated that appellant only left business cards at the store. P&J Formal Country indicated that she kept her own employment records. On July 31, 2019 OIG agents interviewed appellant and showed her a copy of her 2017 Internal Revenue Service (IRS) Form 1099-MISC, indicating that she had earned \$4,115.00. Appellant advised that her children did the work and put the money in her account. She related that she began doing alterations again in September 2018. The OIG informed her that an agent had a dress altered from her in July 2018. It noted that she had not provided the agent with an invoice.

The OIG submitted a Facebook page from Joy2Sew advising clients to contact appellant for their sewing needs. It also submitted a ledger from Joy2Sew, documenting earnings from January 22 through May 27, 2016 of \$2,126.00. Entries from a 2017 ledger indicated that Joy2Sew had earnings of \$4,115.00 for work performed January 20 through May 26, 2017. An IRS 1099-MISC form from 2017 also showed earnings of \$4,115.00. Entries from a 2018 ledger revealed earnings of over \$4,000.00 from January 19 to October 19, 2018.⁴ An IRS 1099-MISC form from 2018 demonstrated income of \$3,610.00.

The OIG's office also submitted a copy of the memorandum of interview on July 31, 2019 between appellant and agents which the OIG summarized in its report.

⁴ The total amount listed on the handwritten ledger is difficult to read.

By decision dated June 10, 2020, OWCP found that appellant had forfeited her entitlement to compensation from November 26, 2016 to February 26, 2018 under 5 U.S.C. § 8106(b) as she knowingly failed to report earnings from employment. It found that she had not correctly completed a Form EN1032 signed February 26, 2018. OWCP thus determined that appellant was not eligible for compensation for the 15 months prior to the date she signed the February 26, 2018 Form EN1032, November 26, 2016 to February 26, 2018.⁵

LEGAL PRECEDENT

Section 8106(b) of FECA provides that an employee who “fails to make an affidavit or report when required or knowingly omits or understates any part of his earnings, forfeits his right to compensation with respect to any period for which the affidavit or report was required.”⁶

An employee, however, can only be subjected to the forfeiture provision of 5 U.S.C. § 8106 if he or she knowingly failed to report employment or earnings. It is not enough to merely establish that there were unreported earnings. The Board has recognized that forfeiture is a penalty, and, as a penalty provision, it must be narrowly construed.⁷ The term knowingly is defined within OWCP’s regulations as with knowledge, consciously, willfully, or intentionally.⁸

OWCP regulations define earnings from employment or self-employment as: (1) gross earnings or wages before any deductions and includes the value of subsistence, quarters, reimbursed expenses, and any offer goods or services received in kind as remuneration; or (2) a reasonable estimate of the cost to have someone else perform the duties of an individual who accepts no remuneration.⁹ Neither lack of profits nor the characterization of the duties as a hobby removes an unremunerated individual’s responsibility to report the estimated cost to have someone else perform his or her duties.¹⁰

ANALYSIS

The Board finds that OWCP properly determined that appellant forfeited her right to compensation for the period November 26, 2016 to February 26, 2018, pursuant to 5 U.S.C. § 8106(b)(2) of FECA, because she knowingly failed to report her employment activities and earnings.

The EN1032 forms sent by OWCP to appellant advised her of her responsibility to complete the forms and provide all relevant information concerning her employment status and

⁵ OWCP also issued preliminary determination of overpayment based on the forfeiture finding; however, the overpayment has not been finalized.

⁶ 5 U.S.C. § 8106(b).

⁷ *P.H.*, Docket No. 17-1362 (issued March 13, 2018).

⁸ 20 C.F.R. § 10.5(n); *R.A.*, Docket No. 18-0406 (issued January 28, 2019).

⁹ *Id.* at § 10.5(g).

¹⁰ *Id.*

earnings during the 15-month period covered by the forms. The forms she signed indicated that she must report all self-employment or involvement in business enterprises. This included such activities as overseeing a business of any kind, including involvement in any enterprise she owned.

In a Form EN1032 signed February 26, 2018, appellant responded that she had been unemployed for all periods during the prior 15 months. She marked “X” next to the question of whether she had worked for an employer or been self-employed during the previous 15-month period.

After the OIG’s office had contacted appellant, and OWCP advised that she had failed to adequately complete the February 26, 2018 Form EN1032, she submitted a Form EN1032 signed on April 5, 2018. Appellant indicated that she had been self-employed from “February through April” at Joy2Sew. She related that it was contract work performed by her children. Appellant did not provide her earnings, but instead indicated that pay depended on the job.

The OIG began investigating appellant in March 2018. An investigative report from the OIG dated April 29, 2020 indicated that she had a Facebook page for her business, Joy2Sew, with posts on the site from March 2, 2017 to January 24, 2018. On July 12, 2018 two agents posing as customers spoke with appellant. She informed them that, during prom season of the prior year, or 2017, she had performed alterations to 52 dresses one week and 35 dresses another week. The OIG submitted an IRS Form 1099-MISC showing that she had earnings of \$4,115.00 for 2017. A ledger showing earnings from Joy2Sew from 2017 also support that she earned \$4,115.00 and listed work performed from January 20 through May 26, 2017.

Appellant can be subject to the forfeiture provision of section 8106(c) only if she knowingly failed to report earnings or employment. OWCP has the burden of proof to establish that a claimant did, either with knowledge, consciously, willfully, or intentionally, fail to report earnings from employment.¹¹ The Board finds that appellant’s filing of tax returns advising the IRS of income generated by her business is persuasive evidence that she knew that she had income from employment and also the amount of the income, which she failed to disclose on the EN1032 form. Her signing of a strongly worded certification clause on the EN1032 forms demonstrates that she was aware of the materiality of her failure to report her employment activity.¹² Therefore, appellant knowingly failed to comply with the reporting requirements.¹³

As she failed to disclose her earnings on the February 26, 2018 Form EN1032, appellant forfeited entitlement to compensation for the 15-month period covered by the form. She further failed to fully disclose her earnings and employment activity on a subsequent Form EN1032 dated April 4, 2018. If a Form EN1032 is improperly completed, resulting in a finding of forfeiture, the period of the forfeiture is the entire 15-month period covered by the form in question.¹⁴ The Board,

¹¹ See *S.M.*, Docket No. 16-1612 (issued April 11, 2018).

¹² *C.W.*, Docket No. 18-1557 (issued June 25, 2019); *M.O.*, Docket No. 18-0686 (issued January 25, 2019).

¹³ *M.O.*, *id.*; *I.S.*, Docket No. 17-0897 (issued April 9, 2018).

¹⁴ See *J.C.*, Docket No. 16-1058 (issued July 10, 2017); *R.B.*, Docket No. 15-1946 (issued September 2, 2016).

thus, finds that she knowingly failed to report employment activity and forfeited her right to compensation for the period November 26, 2016 to February 26, 2018.¹⁵

On appeal counsel argues that OWCP should have reduced appellant's wage-loss compensation based on her actual earnings rather than finding that she forfeited her entitlement to compensation. As noted above, however, she failed to fully disclose her employment activities and earnings during the period of November 26, 2016 to February 26, 2018. Consequently, OWCP properly found that appellant forfeited her right to compensation.

CONCLUSION

The Board finds that OWCP properly determined that appellant forfeited her right to compensation for the period November 26, 2016 to February 26, 2018, pursuant 5 U.S.C. § 8106(b)(2) of FECA, because she knowingly failed to report her employment activities and earnings.

ORDER

IT IS HEREBY ORDERED THAT the June 10, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 9, 2021
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

¹⁵ *Id.*